

Tips on Cross Examination



Bryon Benevento
Dorsey & Whitney, LLP
136 So. Main Street, #1000
Salt Lake City, Utah 84101
801-699-5166

Should You Cross At All?



- Can you get the same evidence with the same persuasion from a friendly witness?
- Will your cross truly detract from your opponents' case?

Basics



- Don't cover everything the witness said on direct. Pick your strongest points and get out as fast and as strong as possible.
- Rule of three is followed by most – 3 points and get out.
- Be prepared with your exam, exhibits and impeachment materials. Nothing is worse than looking unprepared and unskilled.
- This exercise will be viewed as a battle between you and the witness. You don't want to lose that battle.

Basics (cont.)



- Don't exceed scope of direct unless it involves issues of bias, motive, interest, untruthfulness or prior inconsistent statements.
- You are in command. You should be doing most of the talking.
- Lead: No open questions.
- Short questions that must be answered yes or no if possible.
- Don't impeach unless it is highly relevant. You can be viewed as a bully if you impeach on small points and you waste time and credibility.
- Don't argue with the witness.
- Don't use intimidating behavior.

Basics (cont.)



- Avoid the ultimate question.
- Listen to the witness and insist on an answer.
- Don't fish for answers.
- Don't ask for explanations.
- Don't fill in gaps if the witness didn't complete the story on direct; they will be explained away or cured in re-direct. Leave the gaps for closing.

Basics (cont.)



- Don't ask the witness to agree with your characterization; only ask about facts so the witness can't waffle or argue with your characterization.

Organization



- Don't write your questions out. Use an outline of topics that is cross-referenced to exhibits or deposition pages.
- Effective cross often succeeds through implication and innuendo. You don't have to get a clean admission.
- Start with details that can't be denied.
- Then lead to the point you want to make. "It was a sunny day." Start with no umbrella; no overcast; lights on car not needed therefore it was a sunny day?
- End strong with admissible evidence.

Re-establishing Control of Witness



- Witness thinks she needs to explain; usually due to your question.
 - **Don't** interrupt the witness. The judge/jury will want to hear the explanation.
 - Say: I am sorry, I asked that question poorly; I wanted to know
 - Two exceptions:
 - (1) Witness blurts out something inadmissible; or,
 - (2) Apparent to all that the witness is non-compliant with the rules of questioning.

Re-establishing Control of Witness (cont.)



- Try non-verbal control: Glare; upraise hand or ask another question as the witness pauses to take a breath.
- Don't seek the assistance of the judge until you have earned it. Make sure you have tried several times and it is apparent to everyone that the witness is refusing to answer.
- Repeat the question.
- Make sure it is short and subject only to a yes or no.
- Make sure it is a significant point.